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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PACIFIC COAST FEDERATION OF  
FISHERMEN'S ASSOCIATIONS;  
INSTITUTE FOR FISHERIES  
RESOURCES; OREGON NATURAL  
RESOURCES COUNCIL; and UMPQUA  
WATERSHEDS, INC.,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE,

Defendant,

and

AMERICAN FOREST RESOURCE COUN-  
CIL,

Defendant-Intervenor.

NO. C00-1757R

ORDER GRANTING PLAINTIFFS'  
MOTION FOR PRELIMINARY  
INJUNCTION AND DENYING  
DEFENDANT'S REQUEST FOR STAY

THIS MATTER comes before the court on a motion by plaintiffs  
Pacific Coast Federation of Fishermen's Associations, Institute  
for Fisheries Resources, Oregon Natural Resources Council, and  
Umpqua Watersheds, Inc. (hereinafter collectively "PCFFA" unless

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*34*

1 individually identified) for preliminary injunction. PCFFA asks  
2 the court to direct defendant National Marine Fisheries Service  
3 (hereinafter "NMFS") to withdraw 20 biological opinions regarding  
4 timber sales in the Pacific Northwest, alleging that the biologi-  
5 cal opinions were improperly issued and therefore invalid. NMFS  
6 opposes PCFFA's motion, and has asked the court to stay the in-  
7 stant litigation pending the Ninth Circuit's ruling on a closely  
8 related case. Having reviewed the pleadings filed in support of  
9 and in opposition to the motion, together with the relevant files,  
10 and being fully advised, the court finds and rules as follows:  
11

#### 12 I. BACKGROUND

13  
14 This is the third chapter in an ongoing saga surrounding  
15 NMFS' consultation process with respect to the Northwest Forest  
16 Plan (hereinafter "NFP"), a comprehensive management strategy  
17 designed to deal with spotted owl habitat in the northwest's old-  
18 growth forests.<sup>1</sup> A component of the NFP is the Aquatic Conserva-  
19 tion Strategy (hereinafter "ACS"), which is designed to address  
20 the health and habitat quality of salmonid species found within  
21 the forests covered by the NFP. The ACS has four essential compo-  
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23 <sup>1</sup> The complete factual, legislative, and procedural background  
24 relevant to this case is fully set out in the court's Order  
25 Granting Plaintiff's Motion for Summary Judgment, published at 71  
26 F. Supp.2d 1063 (W.D. Wa. 1999), and will not be repeated here.  
The court reports herein only those facts necessary to understand  
its ruling.

1 nents: 1) riparian buffers, or land reserves along streams subject  
2 to special management standards; 2) designation of key watersheds,  
3 sources of high quality water for at-risk fish species; 3) water-  
4 shed analysis procedures to guide planning, monitoring, and resto-  
5 ration programs; and 4) long-term watershed restoration programs  
6 to improve the health of aquatic ecosystems. Record of Decision  
7 for Amendments to Forest Service and Bureau of Land Management  
8 Planning Documents, Exh. U to Hasselman Decl. at B-12. On March  
9 18, 1997, NMFS promulgated a biological opinion on the NFP (the  
10 "NFP Biological Opinion") aimed at complying with the standards  
11 and guidelines laid down in the ACS, which provides in pertinent  
12 part that:  
13

14 (1) essential components of the . . . ACS objectives,  
15 watershed analysis, restoration, land allocations, and  
16 standards and guidelines, will be fully applied at the  
17 four spatial scales of implementation (region, province,  
18 watershed, and site or project); (2) management actions  
19 will comply with all applicable land allocations and  
20 standards and guidelines; and (3) management actions  
21 will promote attainment of the ACS objectives.

22 See NFP Biological Opinion, Exh. V to Hasselman Decl. at 38. A  
23 given project will be found not to jeopardize a listed species if  
24 these criteria are met, as NMFS recognized that a "pivotal issue  
25 in applying these criteria is determining whether proposed actions  
26 are properly designed and mitigated to ensure full attainment of  
27 ACS objectives." Id.

28 This court upheld the validity of the NFP Biological Opinion

1 in a previous litigation between these same parties, and found in  
2 it an obligation that individual projects undertaken under the NFP  
3 must be tailored to meet the ACS objectives. See PCFFA v. NMFS,  
4 No. 97-775R (PCFFA I) (finding, in addition, NMFS' assumption that  
5 associated government agencies, in particular the Bureau of Land  
6 Management and United States Forest Service, would act in accor-  
7 dance with the ACS justified). In that same opinion, the court  
8 invalidated two site specific biological opinions because they did  
9 not adequately address site specific compliance with ACS stan-  
10 dards.  
11

12 The court had occasion to address four more NMFS biological  
13 opinions, issued with respect to the Umpqua Basin and the resident  
14 cutthroat trout and Oregon coastal coho, in PCFFA v. NMFS, 71 F.  
15 Supp.2d 1063 (W.D. Wa. 1999) (PCFFA II). There, the court deter-  
16 mined that NMFS had erred during its consultation process by 1)  
17 measuring ACS compliance only on the watershed scale, rather than  
18 at the site-specific level; 2) failing to consider short-term  
19 impacts in its jeopardy determinations; and 3) failing to insist  
20 on strict compliance with ACS riparian reserve standards. More-  
21 over, by failing to fully incorporate the recommendations con-  
22 tained in its expert panel's watershed analyses, NMFS was found to  
23 have violated the best scientific information rule of the Endan-  
24 gered Species Act ("ESA"), 16 U.S.C. §1536. See generally PCFFA  
25 II, 71 F. Supp.2d at 1068-73. This failure "has virtually guaran-  
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1 teed that no timber sale will ever be found to jeopardize the  
2 continued existence of the [listed species]." Id. at 1073. The  
3 court concluded that, "[b]y employing a long term/watershed ap-  
4 proach in making jeopardy determinations [and] . . . failing to  
5 require the action agencies to rely on and adequately incorporate  
6 watershed analysis into their biological opinions," NMFS had acted  
7 in an arbitrary and capricious manner under the Administrative  
8 Procedures Act, 5 U.S.C. §706. Id. NMFS' appeal from that deci-  
9 sion is currently pending before the Ninth Circuit Court of Ap-  
10 peals.

11  
12 NMFS issued the 20 biological opinions challenged in the  
13 instant suit following the same consultation guidelines invali-  
14 dated by the court in PCFFA II. PCFFA, after unsuccessful at-  
15 tempts to deal with NMFS directly, brought this motion for a  
16 preliminary injunction preventing NMFS from acting on the biologi-  
17 cal opinions pending the Ninth Circuit's ruling on the appeal in  
18 PCFFA II and NMFS's compliance therewith. NMFS agrees that the  
19 issues in this case will be resolved by the Ninth Circuit's rul-  
20 ing, but has requested that the court stay this litigation until  
21 that resolution is handed down.

## 22 II. DISCUSSION

### 23 A. Preliminary Injunction Standard

24 The traditional test for a preliminary injunction requires  
25  
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1 the moving party to show either 1) a combination of likely success  
2 on the merits and the possibility of irreparable injury; or 2)  
3 that serious questions as to the merits are raised and that the  
4 balance of hardships tips sharply in the moving party's favor.  
5 Sierra Club v. Marsh, 816 F.2d 1376 (9<sup>th</sup> Cir. 1987). Under this  
6 scheme, the requisite likelihood of success on the merits that  
7 must be demonstrated is inversely proportional to the requisite  
8 degree of irreparable injury. See Dr. Suess Enterprises, L.P. v.  
9 Penguin Books USA, Inc., 109 F.3d 1394, 1396 (9<sup>th</sup> Cir. 1997). An  
10 additional consideration is whether the public interest favors the  
11 injunction sought. Caribbean Marine Servs. v. Baldrige, 844 F.2d  
12 668, 674 (9<sup>th</sup> Cir. 1988). A plaintiff presenting claims under the  
13 ESA has a reduced burden of showing harm and that the public  
14 interest favors the injunction, because the ESA evidences con-  
15 gress's intent that the balance of hardships and the public inter-  
16 est normally tip sharply in favor of the endangered species. See  
17 Tennessee Valley Authority v. Hill, 437 U.S. 153, 193-94 (1978);  
18 National Wildlife Federation v. Burlington Northern R.R., Inc., 23  
19 F.3d 1508, 1510-11 (9<sup>th</sup> Cir. 1994). Nevertheless, some showing of  
20 harm is still necessary in an ESA case. National Wildlife Federa-  
21 tion, 23 F.3d at 1510.

22  
23 B. Likelihood of Success on the Merits

24 PCFFA argues that the 20 biological opinions it is currently  
25 challenging were issued according to the same consultation guide-  
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1 lines which this court found arbitrary and capricious in PCFFA II,  
2 thus evidencing a strong likelihood of success on the merits of  
3 its case. NMFS does not dispute that characterization, but seeks  
4 to distinguish this case from PCFFA II on the grounds that differ-  
5 ent geographic regions and salmonid species are at issue here.  
6 That distinction is meaningless where, as here, the validity of  
7 NMFS' decision making processes, not just the individual decisions  
8 themselves, are at issue.

9  
10 Furthermore, NMFS' opposition to PCFFA's motion for prelimi-  
11 nary injunction is dedicated to convincing the court that its  
12 prior ruling is incorrect. Predictably, the court disagrees.  
13 There is no dispute that, in the instant opinions, NMFS has again  
14 1) failed to measure project impacts on the site specific scale,  
15 instead reviewing for compliance with ACS guidelines on a water-  
16 shed level; 2) ignored short term effects that would not be mea-  
17 surable ten or more years after the action; 3) failed to fully  
18 implement applicable watershed analyses prepared by its own expert  
19 panel; and 4) not insisted on strict compliance with ACS riparian  
20 reserve standards without justifying its departure. These actions  
21 were held to violate the APA and ESA in PCFFA II. NMFS has made  
22 no showing that the court's prior ruling is in error, or that  
23 these opinions are somehow not governed by the ruling in PCFFA II.  
24 The court therefore finds that PCFFA's likelihood of success on  
25 the merits of the instant case is exceedingly strong.  
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1 C. Harm

2 PCFFA claims irreparable harm exists in that NMFS cannot  
3 ensure that listed species will not be jeopardized by the projects  
4 subject to the biological opinions in dispute because the consul-  
5 tation process itself is flawed. Relying on Thomas v. Peterson,  
6 753 F.2d 754 (9<sup>th</sup> Cir. 1985), PCFFA argues that, given "a substan-  
7 tial procedural violation of the ESA in connection with a federal  
8 project, the remedy must be an injunction of the project pending  
9 compliance with the ESA." See Thomas, 753 F.2d at 764.

10 NMFS responds that the requested injunction is unnecessary  
11 and improper because PCFFA has made no showing that the fish  
12 species of concern will actually suffer if an injunction is not  
13 issued. NMFS also appears to rely on the substantial inconve-  
14 nience an injunction would work on third parties, and on the fact  
15 that an injunction would prevent a number of non-timber sale  
16 activities that had been approved in the subject biological opin-  
17 ions. These non-timber activities include road maintenance and  
18 decommissioning, erosion control projects and widespread trail  
19 upkeep. NMFS argues that an injunction preventing these non-  
20 timber activities would be more harmful than allowing action under  
21 the 20 biological opinions to proceed. On the basis of this  
22 purported favorable balance of harms, NMFS asks the court to stay  
23 this litigation and leave it free to act on the biological opin-  
24 ions until the Ninth Circuit rules on the PCFFA II appeal. NMFS's  
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1 request for a stay thus presents essentially the same issue as  
2 PCFFA's request for an injunction.

3 While the court is mindful of the complications an injunction  
4 will likely work on NMFS's management activities, that inconve-  
5 nience is not nearly sufficient to outweigh the immediate threat  
6 posed by biological opinions that were, most likely, improperly  
7 issued. There is a discrete and immediate harm posed to listed  
8 species by logging and timber activities undertaken pursuant to  
9 biological opinions that fail to properly assess the potential  
10 environmental harm associated with such forestry actions. NMFS  
11 cannot avoid the obligation to assess short term, site level  
12 impacts contained in the NFP Biological Opinion simply because it  
13 included detrimental and rehabilitative activities within a single  
14 biological opinion on an individual project.  
15

16 In sum, the court finds that the possibility of irreparable  
17 harm exists on the facts of this case. Moreover, the balance of  
18 hardships, and certainly the public interest, tip sharply in favor  
19 of PCFFA in its attempt to enforce the provisions of the NFP and  
20 the ESA. Because more harm will flow from staying this action  
21 than will flow from staying NMFS's activity under the challenged  
22 biological opinions, NMFS is not entitled to a stay of this liti-  
23 gation.

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26 ORDER

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III. CONCLUSION

For the foregoing reasons, the court finds that PCFFA is entitled to a preliminary injunction during the pendency of NMFS's case before the court of appeals. The court therefore enjoins NMFS from taking any action on the challenged opinions until the Ninth Circuit issues its mandate on the PCFFA II appeal. The injunction against NMFS shall remain in place until such time as NMFS is in compliance with the Ninth Circuit's decision. NMFS's motion for a stay pending the outcome of PCFFA II is DENIED.

DATED at Seattle, Washington this 7<sup>th</sup> day of December, 2000.

  
BARBARA JACOBS ROTHSTEIN  
UNITED STATES DISTRICT JUDGE